Editor's note: 85 I.D. 161

ISLAND CREEK COAL CO.

IBLA 78-62 Decided May 30, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting applications for extensions of coal prospecting permits W-23469 through W-23472, W-23474, and W-23475.

Affirmed.

1. Applications and Entries: Valid Existing Rights -- Coal Leases and Permits: Applications -- Coal Leases and Permits: Permits: Generally

   Sec. 4 of the Federal Coal Leasing Amendments Act of 1975 removes the authority of the Secretary to grant extensions of coal prospecting permits, subject to valid existing rights, and applies to applications for permit extensions pending at the time the law was enacted by Congress. Such pending applications are not valid existing rights under sec. 4 of the 1975 Amendments Act because the authority to grant coal prospecting permit extensions was discretionary with the Secretary.

2. Coal Leases and Permits: Applications -- Coal Leases and Permits: Permits: Generally -- Mineral Leasing Act: Generally -- Secretary of the Interior

   The Federal coal program was substantially revised in 1973 by the Secretary in proper exercise of his discretion. The Bureau of Land Management did not act in an arbitrary and capricious manner when, under the new coal policy, it suspended applications for coal prospecting permit extensions and the applications were eventually rejected because the Federal Coal Leasing Amendments Act of 1975 removed the authority to grant coal prospecting permit extensions. A program pursued for a period of time under a statutory grant of discretionary authority may be reviewed and revised at any time provided it is not done in an arbitrary manner and is done within the authority granted by Congress.

3. Authority to Bind Government -- Federal Employees and Officers: Authority to Bind Government -- Coal Leases and Permits: Generally

   Reliance upon erroneous information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law. The fact that a coal prospecting permittee alleges he was assured by BLM employees that he would receive permit extensions does not prevent the applicability of subsequent legislation which prohibits such extensions from causing his extension applications to be rejected.

APPEARANCES: William K. Bodell II, Esq., Lexington, Kentucky, for appellant; Lawrence G. McBride, Esq., Office of the Solicitor, Washington, D.C., for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Island Creek Coal Company appeals from the October 5, 1977, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting its applications for extensions of coal prospecting permits W-23469 through W-23472, W-23474, and W-23475. Each prospecting permit was issued with an effective date of December 1, 1970, for the statutory term of 2 years pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b) (1970). The extension applications were filed in the State Office on November 24, 1972. The State Office rejected the applications because section 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 1085, 30 U.S.C.A. § 201(b) (West Supp. 1977), terminated the authority of the Secretary of the Interior to issue extensions of coal prospecting permits.

The former provision of the Mineral Leasing Act governing coal prospecting permit extensions, 30 U.S.C. § 201(b) (1970), sets the criteria the permittee must meet in order to be eligible for the extension. A December 5, 1972, memorandum from the U.S. Geological Survey Regional Mining Supervisor, Billings, Montana, to the BLM Wyoming State Director indicates that appellant met the criteria at the expiration of the original term of its permits. Thereafter, the extension applications were referred to the BLM Director for review.

In February 1973, the Secretary of the Interior announced that no new coal prospecting permits would be issued pending further notice and that no coal leases would be issued unless certain "short-term criteria" were met. The purpose of this moratorium was to develop "long-term" coal leasing policies and procedures. Throughout 1973, the BLM Director issued instruction memoranda which established the procedures for adjudicating coal lease applications in accordance with the Secretary's criteria. Subsequently, the BLM Assistant Director informed the BLM Wyoming State Director that appellant's extension applications might be approved if they met the short-term coal leasing criteria. Otherwise, the applications were to be suspended until further notice.

By letter dated January 18, 1974, the State Office informed appellant that its extension applications must meet the short-term coal leasing criteria or they would be suspended. Appellant was given the opportunity to submit additional information to show that its applications met the short-term criteria. However, appellant did not do so. No further action was taken on its applications until the decision appealed from was issued. During that time, the Federal Coal Leasing Amendments Act of 1975 was enacted by Congress.

Appellant argues that the BLM decision is arbitrary, capricious and a denial of its vested rights in the prospecting permits. Appellant also argues, in effect, that BLM cannot apply a statute enacted

after the extension applications were filed. In support of its arguments, appellant alleges that it expended time and money in coal exploration with the expectation that it would receive extensions in accordance with BLM's "established practice" of automatically granting such extensions. Appellant requests a "public hearing" to prove BLM has such an established practice. Finally, appellant alleges that "authorized representatives" of BLM assured it the Secretary would grant the extensions.

The Solicitor's Office filed an answer on behalf of BLM to appellant's statement of reasons. The Solicitor argues that BLM's decision was not arbitrary and capricious because Congress had removed its authority to grant extensions. The Solicitor asserts that regardless of past actions by BLM, the authority to grant coal prospecting permits extensions has always been discretionary. It argues that applications for discretionary action do not create valid existing rights and therefore the effect of the Federal Coal Leasing Amendments Act of 1975 applies to appellant's applications. The Solicitor details the actions of the Department regarding its coal leasing policy and the actions of BLM regarding appellant's extension applications. It argues that the necessary elements of estoppel are absent from the handling of appellant's applications. It makes additional arguments which need not be discussed in this decision.

We find that appellant has failed to show that it had a valid existing right to the permit extensions. We also find that in the

absence of a vested right, BLM now has no authority to grant the extensions. For the reasons stated below, we affirm the decision of the BLM State Office rejecting appellant's permit extension applications.

[1] Section 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1085, completely revised that part of section 2 of the Mineral Leasing Act set forth in 30 U.S.C. § 201(b) (1970) "subject to valid existing rights." Among other things, the revision ended the prospecting permit system of Federal coal land development. As a result, the coal prospecting permit extension provision in the pre-1976 version of 30 U.S.C. § 201(b) (1970) is no longer in effect and no new provision has been enacted.

Appellant argues that the new statute cannot affect its extension applications because they were filed before the new statute was enacted. This Department must administer the public lands in accordance with existing law. Unless appellant can show that its applications are "valid existing rights," it cannot receive extensions of its coal prospecting permits because the Department no longer has authority to grant such extensions. American Nuclear Corp. v. Andrus, 434 F. Supp. 1035 (D. Wyo. 1977); see Hunter v. Morton, 529 F.2d 645, 648-49 (10th Cir. 1976); Hannifin v. Morton, 444 F.2d 200, 202-203 (10th Cir. 1971); Miller v. Udall, 317 F.2d 573 (D.C. Cir. 1963).

In order to establish that it has a "valid existing right" to the permit extensions, appellant must show that the Department "had

no discretion to grant or deny a privilege, but had the function only of determining whether an existing privilege granted by Congress had been properly invoked." Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969). Section 2 of the Mineral Leasing Act, under which appellant applied for the extensions, stated: "Any coal prospecting permit * * * may be extended by the Secretary for a period of two years, if he shall find * * *." 30 U.S.C. § 201(b) (1970). (Emphasis added.)

The courts have construed statutes using the word "may" in grants of authority as discretionary in the exercise of that authority. Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976); Schraier v. Hickel, supra at 666; cf. National Wildlife Federation v. Morton, 393 F. Supp. 1286, 1295 (D.D.C. 1975) (use of "shall" construed as mandatory). The statute here, 30 U.S.C. § 201(b) (1970), sets standards for the granting of permit extensions, but clearly leaves approval of an extension application meeting the standards to the discretion of the Secretary. Peabody Coal Company, 34 IBLA 139 (1978); Solicitor's Opinion, 84 I.D. 415 (1977); see Arthur E. Moreton, A-27172 (December 28, 1955). Therefore, a pending application for a coal prospecting permit extension is not a "valid existing right" within the meaning of section 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1085.

[2] Appellant further argues that it is entitled to the extensions based upon BLM's "established practice" of automatically granting coal prospecting permit extensions in the past. Appellant has

confused practices of BLM with rights under law. The entire Federal coal program was substantially revised in 1973 when the Secretary, pending review of coal development policy and procedures, halted the issuance of coal prospecting permits and restricted the issuance of coal leases. E.g., L. A. Walstrom, Jr., 25 IBLA 186 (1976); Reliable Coal & Mining Co., 18 IBLA 342 (1975). These alterations were held to be within the discretion of the Secretary. Hunter v. Morton, supra.

The modifications of the coal program were announced in February 1973, 3 months after appellant applied for the extensions. As described above, the Department prepared and issued its "short-term" leasing procedures at various times during 1973. We presume appellant was aware that the Department was reviewing its coal development policy and procedures. In January 1974, BLM requested that appellant show how its extension applications met the short-term leasing criteria or else the applications would be suspended. Thus, appellant was kept informed of the changing departmental coal policy and was provided the opportunity to meet the new criteria. Appellant did not avail itself of this opportunity. Congress then enacted legislation which precluded appellant from receiving the extensions under any circumstances. Such a sequence of events does not constitute arbitrary and capricious action by BLM. Hunter v. Morton, supra; Peabody Coal Co., supra.

This Department is not bound forever by adopting a particular program under a statutory grant of discretionary authority. The Secretary may review and revise that program at any time provided that the review and revision is not conducted in an arbitrary manner and is within the authority granted by Congress. As the Supreme Court stated, agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397, 416 (1967); accord F.C.C. v. Woko, Inc., 329 U.S. 223 (1946); F.T.C. v. Crowther, 430 F.2d 510 (D.C. Cir. 1970). Thus, appellant gains no right to the extensions even if BLM may have had a prior practice of granting extensions automatically to qualified permittees. Because appellant has no legal right to the extensions, we deny its request for a hearing on the factual question of BLM's "established practice."

[3] In its final argument, appellant alleges that "authorized representatives" of BLM assured it the extensions would be granted. Appellant offered no substantiation of this allegation nor explained how it relied upon such statements to its detriment. Reliance upon erroneous information provided by employees of BLM cannot create any rights not authorized by law. Joe I. Sanchez, 32 IBLA 228, 233 (1977). Congress enacted legislation which removed the Secretary's authority to grant coal prospecting permit extensions. Therefore, any possibility that appellant had of receiving extensions for his

coal prospecting permits was ended by the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, regardless what the opinions of BLM employees were. See Bankers Life and Casualty Co. v. Village of North Palm Beach, Fla., 469 F.2d 994, 998-99 (5th Cir. 1972), cert. denied, 411 U.S. 916 (1973).

To conclude, nothing that appellant has shown affords any basis for granting the extension applications now. Therefore, other issues raised by the parties which do not affect this conclusion are not addressed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Douglas E. Henriques
Administrative Judge